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Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1971

No._____

ROBERT E. POFF, doing
business as 1st KING,

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC
BEVERAGE CONTROL OF THE
STATE OF CALIFORNIA and THE
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD OF THE STATE
OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

McPHERSON BERRIEN E. MOORE,
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PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

Petitioner, ROBERT E. POFF, respectfully prays that a writ of certiorari be issued to review the final judgment of the Court of Appeals of the State of California entered in the above matter on February 24, 1972.

OPINIONS BELOW

The written decision of the Department

of Alcoholic Beverage Control suspending Petitioner's license for 30 days is set forth in Appendix A. The opinion of the Alcoholic Beverage Control Appeals Board affirming the suspension is set forth in Appendix B. The order of the Court of Appeals denying a petition for writ of review was made without opinion (Appendix C). The order of the Supreme Court of the State of California denying a hearing was also made without opinion (Appendix D).

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Is the Alcoholic Beverage Control Act of the State of California unconstitutional insofar as it permits the Department of Alcoholic Beverage Control to revoke a license upon a determination that live entertainment is obscene or is contrary to public welfare or morals after an administrative proceeding without requiring the Department to seek a judicial determination on the subject.

2. Is the power of the Department of Alcoholic Beverage Control to suspend or revoke a license for conduct contrary to public welfare or morals unconstitutionally broad when applied to speech and expression protected by the First Amendment.

3. Was the Department's finding that the events described in the decision were contrary to public welfare or morals supported by evidence sufficient to satisfy the requirements of the First and Fifth Amendments.

4. Is it a denial of due process for a state court to deny judicial review without reviewing the administrative record when the appeal involves disputed questions of fact.

STATUTORY PROVISIONS INVOLVED

Article XX, Section 22 of the California Constitution which provides in relevant part:

> "The Department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause

that the granting or continuance of such license would be contrary to public welfare or morals, or that a person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude."

California Business and Professions Code Section 24200.

The following are the grounds which constitute a basis for the suspension or the revocation of licenses:

(a) When the continuance of a license would be contrary to public welfare or morals; the proceedings under this section upon this ground are not a limitation upon the Department's authority to proceed under Article XX, Section 22 of the Constitution.

STATEMENT OF THE CASE

Petitioner, ROBERT E. POFF, has been and now is the holder of a bona fide on-sale general license issued by Respondent, DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL permitting him to engage in the activities

permitted by said license at 14401-14403 South Western Avenue, Gardena, California. Said premises are known as and do business as the "1st King."

On February 13, 1970 the Department of Alcoholic Beverage Control (ABC) filed an accusation against Petitioner which alleged that he had permitted or suffered his licensed premises to be used in a manner contrary to public welfare or morals. At the hearing on said accusation it was combined with previous accusations filed against Petitioner. The three combined accusations alleged that on fifteen separate occasions, female entertainers had performed on the stage at Petitioner's licensed premises while completely nude, that while completely nude said entertainers performed various acts specified in the accusation, and that in certain of the instances, members of the audience had made various comments as set forth in the accusations. The accusations further alleged that the acts specified therein were cause for suspension or revocation of Petitioner's license pursuant to Article XX, Section 22, of the Constitution of the State of

California, and Section 24200(a) of the Business and Professions Code, in that said acts were contrary to public welfare and morals.

On February 20, 1970, June 4, 1970, August 4, 1970 and August 12, 1970 a hearing on said accusations was held before Helen L. Gallagher, a hearing officer of the California Office of Administrative Procedure duly appointed to hear the case.

On November 5, 1970 the hearing officer submitted her proposed decision to the Department which was adopted by it as its decision on December 3, 1970. Said accusation is attached hereto as Appendix A and made a part hereof by reference.

Petitioner duly filed his notice of appeal from the decision of the Department to Respondent Alcoholic Beverage Control Appeals Board. Written briefs were filed, and on May 27, 1971, oral argument was heard by the Appeals Board. On January 18, 1972 the Appeals Board issued its written decision affirming the order and decision of ABC. A true and correct copy of the decision of the Appeals Board is contained

in Appendix B and incorporated herein by reference.

On February 17, 1972 Petitioner duly filed a petition for writ of review with the Court of Appeal of the State of California for the Second Appellate District pursuant to Sections 23090, et seq. of the California Business and Professions Code. Said petition was denied on February 24, 1972.

On March 3, 1972 Petitioner duly filed a petition for hearing in the Supreme Court of the State of California. Said petition for hearing was denied on March 22, 1972. Both of said denials were made without opinion and are set forth in Appendixes C and D.

All of the findings of fact contained in the decision are supported by the evidence or by stipulation, with the singular exception of the finding that the various described acts were contrary to public welfare or morals. It is Petitioner's contention that there was no evidence offered to support that latter determination. Moreover, other evidence not reflected in

the decision was also presented by Petitioner.

Petitioner offered into evidence the docket sheets of the criminal cases filed as a result of the incidents set forth in the accusation. These docket sheets showed that the defendants in each case were either found to be not guilty or that the case was dismissed in the interest of justice (RT p. 66; Exhibit C).

John L. Wasserman, a critic employed by the San Francisco Chronicle, testified for Petitioner (RT p. 70). Mr. Wasserman, after qualifying as an expert witness, testified that nude entertainment in bars conforms to the contemporary community standards of the State of California (RT p. 79). He further testified that such nude dancing was entertainment (RT pgs. 85-86). In Mr. Wasserman's opinion, nude dancing on stage does not offend the public welfare or morals (RT pgs. 90-91). On redirect examination, Mr. Wasserman testified that nude entertainers who, while performing on a stage, exposed their vaginal areas and anus do not exceed contemporary community standards in the State of California (RT p. 112). He further testified that the

existence of other facts described in the accusation would not change his opinion (RT p. 113).

Petitioner, ROBERT E. POFF, testified in his own behalf (RT p. 115). He testified that a cover charge is imposed when nude entertainment is presented, that couples frequently attend the show, that minors are not permitted to enter. He further testified that signs outside the premises advise that nude entertainment is presented. The bulk of Petitioner's patrons are repeat customers; he knows of no incident of a dancer being molested or of a patron getting onto the stage. Petitioner further testified that the standard performance involves the performer coming on stage dressed in clothes in which she dances to two songs, that she then dances topless for two songs, and finally dances nude for two songs (RT pgs. 115-120).

Doctor Stanley K. Fitch, a Professor of Psychology at El Camino College, testified on behalf of Petitioner (RT pgs. 127-128). Dr. Fitch testified that the presentation of nude dancing on a stage in a bar before an audience of pre-advised

adults is not injurious to public welfare or morals (RT p. 132). He further testified that there was no connection between nude dancing and anti-social behavior (RT p. 138).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I

THE ALCOHOLIC BEVERAGE CONTROL ACT IS UNCONSTITUTIONAL INSOFAR AS IT PERMITS THE DEPARTMENT TO MAKE A DETERMINATION THAT LIVE ENTERTAINMENT IS OBSCENE OR CONTRARY TO PUBLIC WELFARE OR MORALS IN AN ADMINISTRATIVE PROCEEDING WITHOUT REQUIRING THE DEPARTMENT TO SEEK A JUDICIAL DETERMINATION ON THE SUBJECT.

Under the Alcoholic Beverage Control Act and the Administrative Procedure Act of the State of California, an accusation that a licensee has permitted conduct which is contrary to public welfare or morals is heard at a hearing presided over by a hearing officer who submits a proposed decision to the Department. Bus. & Prof. Code, Section 24210, Gov. Code Sections 11500 et seq. After the decision of the Department is adopted, the licensee may take an appeal to the Alcoholic Beverage Control Appeals

Board, which is also an administrative agency, during which time the Department's decision is automatically stayed. Bus. & Prof. Code, Sections 23080-23089. Judicial review of an adverse decision of the Appeals Board may be obtained only by filing a petition for writ of review to the Court of Appeals, during which time the decision of the Department is stayed only if a stay order is made by the Department or the court. Bus. & Prof. Code, Sections 23090-23090.7. The duty of seeking judicial review is upon the party effected adversely by the decision of the Appeals Board. Bus. & Prof. Code Section 23090.

In a recent case this court held unconstitutional a similar administrative scheme whereby the use of the mails for commerce in obscene materials could be prohibited. Blount v. Rizzi, 400 U.S. 410 (1971), involved the constitutionality of 39 USC Section 4006 which permitted the Postmaster General to return as unlawful mail addressed to a person who is obtaining or attempting to obtain money through the mail for obscene matter, or is depositing in the mail information as to how, where, or from

whom obscene matter may be obtained. (In a 1970 amendment, the section in question was renumbered as Section 3006). A proceeding for such an order foreclosing the use of the mails must be commenced by written complaint and notice of hearing, which is held before a hearing officer who makes a written opinion containing findings of fact and statements of reasons. The pertinent regulations also provide for an administrative appeal within the Post Office Department and no order under Section 4006 may be issued until the administrative proceedings are completed. 400 U.S. pgs. 412-413. Under the provisions of the Federal Administrative Procedure Act, a party adversely effected by a decision of the Postmaster General may seek judicial review, during which time the decision of the Postmaster may be stayed either by him or by the court. 5 USC Sections 701-706. Thus, the administrative circumstances under which the Postmaster General enforced the act in question are virtually identical to the procedural circumstances under which the Department operates.

In Blount the unconstitutionality of

the postal act was based in part upon the grounds that it did not place the burden of initiating judicial review and of proving that the material is unprotected expression on the Postal Department. It was also based upon the ground that prompt judicial review was not required. These same safeguards are lacking in the instant case. As in Blount, the fact that the decision suspending Petitioner's license did not become effective until administrative procedures had been exhausted does not save the procedural scheme, since it was Petitioner who was required to seek and obtain a judicial determination of error.

Blount applies directly to the instant proceedings. It applies all the more if we assume that the Department of Alcoholic Beverage Control is authorized to impose disciplinary action on account of entertainment which is deemed to be contrary to public welfare or morals but need not satisfy constitutional definitions of obscenity. The presentation of such entertainment would then clearly be a form of speech protected by the First Amendment, and the imposition of discipline on account

on such entertainment could not be constitutionally upheld unless grounded upon the most rigorous procedural safeguards. No such safeguards exist or were followed in the instant proceedings. Indeed, the Department by its determination that the conduct involved was per se contrary to public welfare or morals has in effect deprived Petitioner of a fact hearing on that critical issue leaving him as his only remedy the opportunity to "persuade a court" that the Department is in error.

II

THOSE PROVISIONS OF ARTICLE XX, SECTION 22 OF THE CALIFORNIA CONSTITUTION AND SECTION 24200(a) OF THE BUSINESS AND PROFESSIONS CODE WHICH PERMIT THE DEPARTMENT TO REVOKE OR SUSPEND THE LICENSE FOR CONDUCT "CONTRARY TO PUBLIC WELFARE OR MORALS" ARE UNCONSTITUTIONALLY BROAD WHEN APPLIED TO SPEECH AND EXPRESSION PROTECTED BY THE FIRST AMENDMENT.

The doctrine that a statute or regulation may be void because it is overly broad has been succinctly stated by this court in Zwickler v. Koota, 389 U.S. 241 (1967), in which the doctrine of void for

overbreadth was described as meaning that ". . . a government purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the areas of protected freedoms." The reason behind this rule is that the existence of such an overly broad statute is in and of itself an inhibition upon the exercise of First Amendment rights, even though attempted enforcement of the law against activities within the protected area could be successfully defended on the constitutional grounds. Dombrowski v. Pfister, 380 U.S. 479 (1965). In Dombrowski, the court said:

> "A criminal prosecution under a statute regulating expression usually involves imponderables and contingencies that themselves may inhibit the full exercise of First Amendment freedoms. See, eg, Smith v. California, 361 U.S. 147. When the statutes also have an overbroad sweep, as is here alleged, the hazard of Loss or substantial impairment of those

> precious rights may be critical. For in such cases, the statutes lend themselves too readily to denial of those rights. The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases. See Baggett v. Bullitt, supra, 377 U.S. at 379. For '[t]he threat of sanctions may deter . . . almost as potently as the actual application of sanctions. . .'" Dombrowski v. Pfister, supra, 380 U.S. at page 486.

In the instant case, the Department has suspended petitioner's license because he permitted the presence of entertainment involving sex which was deemed by the Department of Alcoholic Beverage Control to be contrary to public welfare or morals. The entertainment was not found to be obscene and therefore must be speech protected by the First Amendment. Indeed, the Department originally alleged that the entertainment was obscene and in violation of Section 311.6 of the California Penal Code, but such allegation

was deleted from the accusation after the hearing. If the Department's authority permits it to take disciplinary action in such circumstances, the authority is overly broad and void by virtue of the above cited cases. On the other hand, if the Department's authority to regulate speech is limited by implication to what is obscene under the First Amendment, the decision in the instant case is invalid because the performances were neither alleged to be nor found to be obscene.

In general, forms of communication and entertainment which deal with or depict sex are protected by the First Amendment and may not be prohibited or restricted unless they are judicially determined to be obscene. Roth v. United States, 354 U.S. 476 (1957); Stanley v. Georgia, 394 U.S. 557 (1969); United States v. Reidel, 402 U.S. 351 (1971). As the California Supreme Court has said in respect of the performance of a dance:

> ". . . the performance of such a dance, like other forms of expression or communication prima facie enjoys protection of the

First Amendment of the Constitution of the United States; it loses such protection upon a showing of obscenity." In re Giannini, 69 Cal.2d 563, 72 Cal.Rptr. 655, 658 (1968).

In the instant case, the accusation did not allege that any of the conduct was lewd or obscene. No violation of the Penal Code was alleged or found to have occurred. The Department's decision that the performances were contrary to public welfare or morals must be expressly based upon the proposition that the Department has the authority to regulate such entertainment whether or not it is obscene.

Except as limited by the Twenty-First Amendment the state regulation of alcoholic beverages must comply with the requirements of the United States Constitution. See Wisconsin v. Constantineau, 400 U.S. 433 (1971).

In a case directly on point, a three-judge District Court of the Central District of California held that Rules 143.3 and 143.4 of the Department of Alcoholic Beverage Control were unconstitutional

insofar as they regulated the content of entertainment. The court held that the Department's rules must conform to the constitutional standards for the regulation of obscenity and that the state could not control such entertainment on a standard of public welfare and morals. The court also held that the Department did not have any special powers to regulate entertainment because alcoholic beverage licenses were involved. LaRue v. State of California, 326 F.Supp. 348 (1971), Prob.Jur. noted, California v. LaRue, 92 S.Ct. 559 (1971).

The issues in LaRue are virtually identical with the issues in the instant case, inasmuch as both involve the question of whether the Department's power under Article XX, Section 22 of the California Constitution permit it to impose disciplinary action on account of entertainment which is not obscene.

It is respectfully submitted that a writ of certiorari should be issued in the instant case and the case combined with LaRue, which is now scheduled for hearing in the fall, 1972 term.

III

THE DECISION OF THE DEPARTMENT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN LIGHT OF THE WHOLE RECORD NOR BY FINDINGS IN THAT NEITHER THE FINDINGS NOR THE EVIDENCE CONTAIN FACTS TENDING TO SHOW THAT THE ACTS COMPLAINED OF WERE CONTRARY TO PUBLIC WELFARE OR MORALS.

In the previous argument, we have established that the constitutional authority of the Department is overly broad when applied to activities which fall within the protection of the First Amendment. We will show in the ensuing argument that the record in the instant case does not support a determination that any of the entertainment presented was contrary to public welfare or morals.

In cases under the public welfare or morals clause, assuming such power to be properly invoked in the instant case, the Department of Alcoholic Beverage Control must have before it evidence to establish good cause for its decision. The requirement that there be proper evidence and findings to support a determination that there is good cause for revocation or

suspension of a license has been recognized many times by the California Supreme Court. The Department's power is not absolute "but must be exercised in accordance with the law and the provisions that it may revoke the license 'for good cause' necessarily implies that its decision should be based on sufficient evidence and that it should not act arbitrarily in determining what is contrary to public welfare and morals." Boreta Enterprises, Inc. v. Alcoholic Beverage Control, 2 Cal.3d 85, 84 Cal.Rptr. 113, 120 (1970).

In the Boreta case, the court observed in a case involving topless waitresses:

> "This conduct was not illegal nor was it in violation of any duly issued rule or regulation of the Department. There was absolutely no evidence presented by the Department at either of the hearings which tended to support its conclusion that topless waitresses are contrary to public welfare and morals because they necessarily lead to improper conduct. No

> intemperance, exploitation, or lewd or criminal contact between customers and the waitresses were shown to have occurred on the premises. The challenged conduct in this case did not occur in the presence of juveniles or in the public streets. In sum, there was neither illegal nor improper conduct on the part of the licensee's waitresses. To establish 'good cause' for the revocation of a licensee's license, something more must be shown than that the licensee employed topless waitresses." 84 Cal.Rptr. at pgs. 127-128.

In the instant case, similarly, no rule or regulation of the Department was alleged or proved to have been violated. No section of the Penal Code was alleged or proved to have been violated. No improper conduct was shown to have occurred between the performers and any other person on the premises. (The shouting of various earthy observations and joking invitations to engage in sexual conduct by members of the

audience is not illegal and can hardly be said to exceed standards of conduct for patrons in a bar). No one on the premises was shown to be intemperate as the result of the acts of the dancers, no one was shown to have been exploited, no lewd or criminal conduct was shown to have occurred. No juveniles were shown to be present. No violation of law was established: indeed, the record showed that all of the criminal cases filed against the performers were either dismissed or resulted in acquittals. In short, there was nothing in the record upon which the Department's determination that the conduct was contrary to public welfare or morals could be supported.

As in the case of prohibition of obscenity, in which community standards are deemed to be an objective fact which must be established by proof, the standards encompassed by "public welfare and morals" should also be deemed objective standards susceptible of proof. The fact that the Department may, if it be a fact, take disciplinary action on a lesser standard of proof than obscenity does not negate the protected status of the entertainment under

the First Amendment. The First Amendment demands that the Department be made to prove by competent evidence its allegations that the public welfare and morals have been violated.

Not only has the Department failed utterly to introduce any evidence to meet its burden of proof, but petitioner has introduced substantial evidence to the contrary. Expert witnesses who testified on behalf of petitioner testified that nude dancing on a stage does not offend public welfare or morals nor does it exceed contemporary community standards. There was also testimony that there was no connection between such dancing and anti-social behavior. Petitioner also testified in his own behalf that patrons are fully advised that nude entertainment is going to be presented when they enter his premises, and that he knows of no incidents of a dancer being molested or of a patron getting on stage during such a performance. He also testified that the presentation of nude dancing does not appear to increase

the sale of alcoholic beverages at his premises. Thus, the only substantial evidence in the record shows that the Department was without foundation in determining that the conduct on Petitioner's premises was contrary to public welfare or morals.

IV

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

McPERSON BERRIEN E. MOORE,
KENNETH SCHOLTZ

Attorneys for Petitioner

APPENDIX A

STATE OF CALIFORNIA
DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
CERTIFICATE OF DECISION

File 1867
Reg. 9739

Registrations 8858 & 8928 are incorporated in this decision

It is hereby certified that the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommendation in the attached proposed decision submitted by a Hearing Officer of the Office of Administrative Procedure, adopted said proposed decision as its decision in the case therein on December 3, 1970.

A representative of the Department will call on you on or after January 21, 1971, to pick up the license certificate.

Sacramento, California
Dated: December 3, 1970

Dorothy Pierson
Hearing and Legal Unit

STATE OF CALIFORNIA

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL

In the Matter of the Accusation Against ROBERT E. POFF dba 1st King 14401-03 S. Western Avenue Gardena on-sale general license Respondent under the Alcoholic Beverage Control Act	File 1867 Reg. 9739 Licenses: 47 Time of Hearing: 8-12-70 9 a.m. Place of Hearing: Los Angeles Reporter: Louise Lillico OLA 22892 Appearances: For Dept: Frank Britt, Counsel Doris Jaffe, Counsel For Resp: Mr.Berrien C. Moore Attorney at Law 1515 Redondo Beach Boulevard Gardena 90247

I hereby certify that the following constitutes my proposed decision in the above-entitled matter as a result of the hearing held before me at the above time and place, after due notice thereof having been according to law, and I hereby recommend its adoption as the decision of the Department of Alcoholic Beverage Control.

PROPOSED DECISION

At the commencement of the proceeding, Register 8858 (OLA 22107) and Register 8928 (OLA 22162) were consolidated with Register 9739. Sub-paragraphs one through five of Register 8928 were added to Count I of Register 9739, and numbered seven through eleven; sub-paragraphs one through four of Register 8858 were added to Count I of Register 9739 and numbered twelve through fifteen.

The accusation was amended at the Hearing as follows:

1. By deleting the word "lewd" wherever it appeared in sub-counts 7 through 11 of Count I.

2. By deleting the word "indecently" wherever it appeared in sub-counts 12 through 15 of Count I.

The matter was submitted subject to the right of respondent to submit a document by way of argument, and said document having been received on October 15, 1970, and identified as Exhibit D, and the Department's reply thereto having been received October 23, 1970, and identified as Exhibit "I",

the Hearing Officer finds as follows:

COUNT I

Within one year last past and immediately prior to the date of the accusation, respondent-licensee directly and by and through his agents, employees, and servants, permitted or suffered the above-designated licensed premises to be used in a manner, more particularly described below:

1. On September 10, 1969, respondent did use the services of a female entertainer, Mary Jo Frazzel, to perform on the stage area in the above-designated licensed premises, while completely nude, thereby exposing her private parts, including her pubic hair, vulva, and bare buttocks to the view of persons present in said premises.

a. Said entertainer, while performing on the stage, exposed her vaginal area to approximately forty-five (45) male customers at the location, fifteen of which were sitting at the counter circling the stage, and while so doing performed bumps and grinds while moving to various parts of the stage and

directing her actions toward the male customers in the immediate vicinity.

b. During this nude performance, male customers were heard to say in a loud voice, "Boy, I'd sure like to eat that pussy"; "Stick that snatch out there where we can see it baby"; and "My God, look at those titties wiggle." In addition, there were "Ya Ho" shoutings, clapping and whistling by several male customers.

2. On September 30, 1969, respondent did use the services of a female entertainer, Teresa Macias Zavala, to perform on the stage area in the above-designated licensed premises, while completely nude, thereby exposing her private parts, including her pubic hair, vulva, and bare buttocks to the view of patrons present in said premises.

a. Said entertainer, while performing on the stage, gyrated her hips in a slow, undulating manner, and thrust her pelvic area forward

in slow, defined movements, exposing her pubic hair and the outer lips of her vagina to the patrons for approximately four to five minutes.

b. During this nude performance, a male patron made a loud comment, "Open them lips, Baby."

3. On October 3, 1969, respondent did use the services of a female entertainer, Joelie Micah Kornfeld, to perform on the stage area in the above-designated licensed premises, while completely nude, thereby exposing her private parts, including her pubic hair, vulva, and bare buttocks to the view of the persons present in said premises.

a. Said entertainer, while performing on the stage, faced a male patron while bending her knees slightly, with legs apart while extending her clenched hands approximately twelve inches apart and to the front as if holding the patron's head, then in rhythm to the music, she thrust her pelvic

area to and fro, as she brought both arms back and forth, suggesting sexual activity. This routine was repeated with several other patrons.

b. Said entertainer, while performing on the stage, did repeat this routine with several other patrons, and while doing so, clearly exposed her pubic area and vaginal lips. During this routine, an unknown patron stated in a loud voice, "If you want me to get up there and kiss it, I will."

4. On October 9, 1969, respondent did use the services of female entertainers, Joelie Micah Kornfeld and Theresa Macias Zavala, to perform on the stage area in the above-designated licensed premises, while completely nude, thereby exposing their private parts, including their pubic hair, vulva, and bare buttocks to the view of persons present in said premises.

a. Said entertainer, Kornfeld, while performing on the stage, gyrated her hips in a slow,

undulating manner, and moved her body slowly, front to rear, side to side, during which time she exposed her pubic hairs to the audience.

b. Said entertainer Zavala, while performing on the stage, made up-and-down jerky movements of her torso and slow rhythmic side-to-side gyration of her hips, while moving about the entire stage, and exposed her pubic hairs and outer lips of the vagina.

c. During Zavala's dance, an unidentified male patron, seated at a table, front center of the stage, stated, "Oh, wow, you sure got a fine puss, baby."

5. On October 10, 1969, respondent did use the services of female entertainers, Ernestine Sutton and Sharon Ann Kerney, to perform on the stage area in the above-designated licensed premises, while completely nude, thereby exposing their private parts, including their pubic hair, vulva, and bare buttocks to the view of the persons present in said premises.

a. Said entertainer, Sutton, while performing on the stage, undulated her hips and swung her arms around exposing her pubic hair and the lips of her vagina; numerous times she stopped in front of patrons, bent her knees slightly and undulated her body back and forth, during which time the lips of her vagina were clearly visible.

b. Said entertainer, Kerney, while performing on the atage, undulated her hips to and fro and back and forth and swung her arms around, during which time the lips of her vagina were clearly visible.

c. During Kerney's dance, an unknown patron at the bar threw a one dollar bill on the stage and stated in a loud voice, "Let's see that snatch, baby. Pick up the buck without using your hands."

6. On November 13, 1969, respondent did use the services of a female entertainer, Joelie Micah Kornfeld, to perform on the stage area in the above-designated licensed

premises, while completely nude, thereby exposing her private parts, including her pubic hair, vulva, and bare buttocks to the view of patrons present in said premises.

a. Said entertainer, while performing on the stage, clad only in a G-string with the panels placed in such a position so as to fully expose her pubic hairs and the lips of her vagina, stood in front of a patron at a distance of approximately three feet and slowly undulated the lower portion of her body in a back and forth motion.

b. While said entertainer was performing on the stage as above, an unidentified male patron remarked, "It's about time, I was getting ready to blow my fucking wad," "Let that breast hang out," and "Come here, let me screw it."

c. Said entertainer, while performing on the stage, completely nude, spread apart her legs and put her arms over her head while standing near the outer perimeter of the stage and slowly gyrated her hips in a circular motion.

d. Said entertainer's motions

brought various statements from the male patrons both about the stage and through the location of "I'd fuck a snake right now if it slid by." That box is so big you'd have to tie a 2 foot by 4 foot to your ass to eat it."

7. On August 27, 1969, during business hours, a female entertainer, Verna Chanora Dean, while dancing on a raised stage located in the above-designated licensed premises, did engage in the following conduct:

a. Said entertainer moved around the entire stage, while completely nude, exposing her vagina and anus areas to the view of male patrons.

b. Said entertainer, while moving about the stage, would kick her feet above head level, thus exposing her vaginal area to view of seated male patrons.

8. On August 28, 1969, during business hours, a female entertainer, Patricia Ann Holly, while dancing on a raised stage located in the above-designated licensed premises, did engage in the following conduct.

a. Said entertainer moved about the stage, while completely nude, and upon coming within two feet of seated male patrons, would kick her feet above head level, thus exposing her vaginal area to the view of the patrons.

b. During this described performance, a patron was heard to comment, "She's sending me love signals," and "You've got it baby, but that fat bitch's thing flaps."

9. On August 29, 1969, during business hours, a female entertainer, Ernestine Sutton, while dancing on a raised stage located in the above-designated licensed premises, did engage in the following conduct:

a. Said entertainer moved about the stage, while completely nude, and exposed her pubic and vaginal areas to the view of seated male patrons.

b. Said entertainer, while completely nude, would bring her exposed pubic area to within six

inches of male patrons' faces and then move her lower body backward and forward.

c. Said entertainer moved her fully exposed pubic area to within three inches of the face of a seated male patron. Said patron had his tongue extended towards the entertainer's pubic area.

d. A male patron placed a glass containing a burning candle between the entertainer's feet, directly below her pubic area, while stating, "Baby, maybe this will get you hot."

10. On September 2, 1969, during business hours, a female entertainer, Olga Lira Rojas, while dancing on a raised stage located in the above-designated licensed premises, did engaged in the following conduct:

a. Said entertainer moved about the stage area, while completely nude, and exposed her pubic,vaginal and anus areas to the view of seated male patrons.

b. Said entertainer, while completely nude, stood in the center

of the raised stage. She placed her feet approximately three feet apart, bent her body backwards from the waist,thrusting her pelvic region forward towards seated male patrons, thus exposing her vaginal area.

c. Said entertainer, while completely nude, stood on the raised stage with her back towards the audience. She bent forward at the waist, as if to pick something up from the floor of the stage. This action caused her buttocks to part, thus exposing her anus to seated male patrons.

d. During the above-described conduct by said entertainer, the following comments were heard spoken by male patrons, "Let me see those beautiful hairy lips." "Come here and put your box in this, it's yours," while holding up a folded $5.00 bill. "I'm hungry, bring me that hair pie." "Sit on his face, he'll heat it."

11. On September 3, 1969, during business hours, a female entertainer, Kathleen Walker, while dancing on a raised stage located in the above-designated licensed premises, did engage in conduct as follows:

a. Said entertainer, while completely nude, would bring her exposed pubic area to within four to five inches of patrons' faces and then move her lower body backward and forward.

b. Said entertainer moved about the stage, while completely nude, and exposed her pubic and vaginal areas to view of seated male patrons.

c. A seated male patron held his arms outstretched towards said entertainer while extending his tongue and licking his lips as the entertainer danced directly in front of this patron.

12. On August 9, 1969, respondent did use the services of a female entertainer, Jeanette Elise Dobie, to perform on the stage area in the above-designated licensed premises, while completely nude, thereby

exposing her private parts, including her pubic hair, vulva, and bare buttocks to the view of persons present in said premises.

13. On August 9, 1969, respondent by and through his employee and agent Betty Gayle Rigsby, as a dancer and entertainer and while dancing and entertaining on a stage in said premises, the said female did divest herself of all clothing, and performed completely nude, thereby exposing her private parts, including her pubic hair, vulva and bare buttocks to the view of persons present in said premises.

14. On August 20, 1969, respondent did use the services of a female entertainer, Kathleen Walker, to perform on the stage area in the above-designated licensed premises, while completely nude, thereby exposing her private parts, including her pubic hair, vulva, and bare buttocks to the view of persons present in said premises.

15. On August 21, 1969, respondent by and through his employee and agent Esther Cady Wood, as a dancer and entertainer and while dancing and entertaining on a stage in said premises, the said female did divest herself of all clothing and

performed completely nude, thereby exposing her private parts, including her pubic hair, vulva and bare buttocks to the view of persons present in said premises.

The conduct and activity described above in subparagraphs 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11 did create conditions then and there contrary to public welfare and morals.

The conduct and activity described hereinabove in paragraphs 7, 12, 13, 14 and 15 did not per se create conditions then and there contrary to public welfare and morals.

SPECIAL FINDINGS:

Pursuant to stipulation, it is found to be true that:

1. There are lighted signs on the exterior of the above-described licensed premises which read "bottomless dancers" and "totally nude dancing".

2. An admission fee of $1.00 is charged patrons entering the above-described premises.

DETERMINATION OF ISSUES:

Grounds for the suspension or revocation of respondent's license were established as to subcounts 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11 of Count I, in that respondent permitted conduct to occur on the licensed premises which was contrary to public welfare and morals in violation of Article XX Section 22 of the California Constitution, and Section 24200(a) of the Business and Professions Code.

Grounds for the suspension or revocation of respondent's license was not established as to subcounts 7, 12, 13, 14 and 15 of Count I, in that respondent did not permit conduct to occur on the licensed premises which was contrary to public welfare and morals in violation of Article XX Section 22 of the California Constitution or Section 24200(a) of the Business and Professions Code.

PENALTY OR RECOMMENDATION:

Count I: The license is suspended for thirty (30) days as to each of subcounts 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11, to run concurrently.

The accusation is dismissed as to subcounts 7, 12, 13, 14 and 15.

Dated at Los Angeles, California; November 5, 1970

Helen L. Gallagher

HELEN L. GALLAGHER,
Hearing Officer
Office of Administrative Procedure

HLG:fr

APPENDIX B

Filed Jan 18 1972
Alcoholic Beverage
Control Appeals
Board

BEFORE THE ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Accusation against ROBERT E. POFF dba 1st King 14401-03 S. Western Avenue Gardena on-sale general license Respondent under the Alcoholic Beverage Control Act.	AB-3589 File No. 1867; Reg. No. 9739; H/O: Bellows and Gallagher Time & Place of Hearing: May 27,1971, at 2 p.m. 314 West First Street Los Angeles, California For Department: Honorable Evelle J. Younger Attorney General Mark Leicester Deputy Attorney General For Appellant: Kenneth Scholtz,Esq.

In this matter Reg. 8858 and Reg. 8928 were consolidated with Reg. 9739 (AB-3589). Subparagraphs 1 through 5 of Reg. 8928 were added to count I of Reg. 9739, and numbered 7 through 11; subparagraphs 1 through 4 of Reg. 8858 were added to count I of Reg.

9739, and numbered 12 through 15. The department affirmed a proposed decision of a hearing officer of the Office of Administrative Procedure determining that grounds for suspension or revocation of appellant's license were established as to subcounts 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11 of count I, in that appellant permitted conduct to occur on licensed premises which was contrary to public welfare or morals in violation of article XX, section 22 of the California Constitution and section 24200(a) of the Business and Professions Code. Furthermore, that grounds for the suspension or revocation of appellant's license were not established as to subcounts 7, 12, 13, 14 and 15 of count I, and, accordingly, were dismissed. As a penalty, appellant's license was suspended for 30 days as to each of subcounts 1, 2, 3, 4, 5, 6, 8, 9, 10 and 11 to run concurrently.

Instant appeal is based upon the grounds:

> "(a) The Department has proceeded without and in excess of its jurisdiction;

"(b) The decision is not supported by the findings;

"(c) That errors of law were made by the Hearing Officer as reflected by the transcript of the proceedings;

"(d) That findings are not supported by substantial evidence in the light of the whole record."

The department's decision contains the following:

[At this point the opinion recites the Findings of Fact as set forth at page A-4 through A-17.]

Review of the record establishes the accusation was amended by striking the words "lewd" and "indecently" wherever they appeared therein. As amended, the parties stipulated that the facts alleged in subcounts 12, 13, 14 and 15 were true; also, that if witnesses for the department were called, they would testify the same as the facts alleged in the accusation relative to subcounts 1, 2, 3, 5, 6, 8, 9, 10 and 11 of count I.

Exhibits pertaining to criminal

proceedings, offered by appellant, were received into evidence.

Appellant presented Mr. John Wasserman, a critic for a newspaper (San Francisco Chronicle), who testified as an expert witness relative to contemporary standards as to nude entertainment within the State of California. In summary, he stated that, to his knowledge, public morals have not been disturbed by nude entertainment (R.T. 80, 83, 84); comments by patrons are not relevant to the issue of nude entertainment nor community standards (R.T. 85); numerous people attending theaters specializing in sex films is a reflection of community standards (R.T. 87); in his opinion, nude dancing does not affect public welfare or morals (R.T. 90), and that comments by patrons did not change his opinion (R.T. 113).

Dr. Stanley K. Fitch, a psychologist, testified on behalf of appellant that in his opinion, speaking as a psychologist, there was no relationship between nude dancing in bar and public welfare or morals; that if there were any relationship, it would have to be on the plus side (R.T. 132); verbal or other behavior between performers

and patrons would have no effect upon his opinion. (R.T. 156).

Appellant presented extensive argument in his opening brief with respect to the following:

1. Article XX, section 22 of the California Constitution, which permits the department to revoke or suspend a license for conduct contrary to public welfare or morals, is unconstitutionally broad when applied to speech and expression protected by the First Amendment.

A. A valid governmental purpose may not not be achieved by means that restrict the exercise of constitutionally protected rights.

B. The department's power to suspend or revoke licenses for conduct contrary to public welfare or morals is unconstitutionally broad as applied in this case.

With respect to the performance of a dance, such form of expression prima facie enjoys protection of the First Amendment of the United States Constitution and only loses such protection upon a showing of obscenity; that in this case, the department did not allege that any of the conduct was

lewd or obscene and no violation of the Penal Code was alleged to have occurred.

2. The decision of the department is not supported by substantial evidence in light of the whole record or by the findings, nor does the evidence contain facts tending to show that the acts complained of were contrary to public welfare or morals.

Under this heading appellant argues that it is well settled that neither nudity nor depiction nor display of sexual activities are necessarily obscene (in re Giannini, 69 Cal.2d 563, 72 Cal.Rptr. 655); that activities of bare breasted waitresses are not necessarily lewd or obscene. (Robbins v. County of Los Angeles, 248 Cal.App.2d 1, 56 Cal.Rptr. 853.) The depiction of nudity in photographs and pictures is granted constitutional protection (In re Panchot, 70 Cal. 2d 105, 73 Cal.Rptr. 689; People v. Rosakos, 268 Cal.App.2d 497, 74 Cal.Rptr. 34; People v. Noroff, 67 Cal.2d 791, 63 Cal.Rptr. 575); that forms of entertainment or communication which contain depictions of sexual acts are not obscene on their face (Jacobellis v. Ohio, 378 U.S. 184, 12 L.Ed.2d 793); that simulated sexual acts performed by actors

during the course of a play are not necessarily lewd and must be considered with regard to the entire context of the play. (Dickson v. Municipal Court, 267 Cal.App.2d 789, 73 Cal.Rptr. 587; Barrows v. Municipal Court, 1 Cal.3d 825.)

Appellant further contends that the record does not contain evidence sufficient to establish that any of the dancers were obscene; that even if the department's power is not limited by the First Amendment, the record in this case fails to establish that any of the conduct disclosed was contrary to public welfare or morals.

3. The presentation of nude dancing on a stage before an audience of consenting adults may not be prohibited.

It is this board's opinion that we are not here concerned with the determination whether the conduct set forth in the findings is obscene, nor that a penal statute has been violated. The issue before us is whether the conduct on the premises is contrary to public welfare or morals. The department's authority in this area, pursuant to Article XX, section 22 of the

California Constitution and section 24200(a) of the Business and Professions Code has been repeatedly recognized by the courts. (Boreta Enterprises, Inc. v. Dept. of Alcoholic Bev. Control, 2 Cal.3d 85.)

As to the case before us, the findings relative to subcounts 9 and 11, respectively, read as follows:

> "9. On August 29, 1969, during business hours, a female entertainer, Ernestine Sutton, while dancing on a raised stage located in the above-designated licensed premises, did engage in the following conduct:
>
> "a. Said entertainer moved about the stage, while completely nude, and exposed her pubic and vaginal areas to the view of seated male patrons.
>
> "b. Said entertainer, while completely nude, would bring her exposed pubic area to within six inches of male patrons' faces and then move her lower body backward and forward.
>
> "c. Said entertainer moved her

fully exposed pubic area to within three inches of the face of a seated male patron. Said patron had his tongue extended towards the entertainer's pubic area.

"d. A male patron placed a glass containing a burning candle between the entertainer's feet, directly below her pubic area, while stating, 'Baby, maybe this will get you hot.'"

* * *

"11. On September 3, 1969, during business hours, a female entertainer, Kathleen Walker, while dancing on a raised stage located in the above-designated licensed premises, did engage in conduct as follows:

"a. Said entertainer, while completely nude, would bring her exposed pubic area to within four to five inches of patrons' faces and then move her lower body backward and forward.

"b. Said entertainer moved about the stage, while completely nude, and exposed her pubic and vaginal

areas to view of seated male patrons.

"c. A seated male patron held his arms outstretched towards said entertainer while extending his tongue and licking his lips as the entertainer danced directly in front of this patron."

Furthermore, when certain female entertainers were performing on the stage in licensed premises, which generally included undulating their hips backward and forward, while completely nude -- thereby exposing their private parts, including pubic hair, vulva and bare buttocks to the view of those present -- the following comments, set forth in the findings, were made by patrons:

" . . . 'Boy, I'd sure like to eat that pussy'; 'Stick that snatch out there where we can see it baby'; and 'My God, look at those titties wiggle.' In addition, there were 'Ya Ho' shoutings, clapping and whistling by several male customers."

(Finding 1, b.)

" . . . 'Open them lips, Baby.'"

(Finding 2, b.)

" . . . 'If you want me to get up there and kiss it, I will.' "

(Finding 3, b.)

" . . . 'Oh, wow, you sure got a fine puss, baby.' "

(Finding 4, c.)

" . . . 'Let's see that snatch, baby. Pick up the buck without using your hands.' "

(Finding 5, c.)

" . . . 'It's about time, I was getting ready to blow my fucking wad,' 'Let that breast hang out,' and 'Come here, let me screw it.' "

* * *

" . . . 'I'd fuck a snake right now if it slid by.' 'That box is so big you'd have to tie a 2 foot by 4 foot to your ass to eat it.' "

(Finding 6, b and d.)

" . . . 'She's sending me love signals,' and 'You've got it baby, but that fat bitch's thing flaps.' "

(Finding 8, b.)

" . . . 'Let me see those beautiful hairy lips.' 'Come here and put your box on this, it's yours,' while holding up a folded $5.00 bill. I'm hungry, bring me that hair pie.' 'Sit on his face, he'll heat it.' "

(Finding 10, d.)

The record indicates that the licensee was generally on the premises every day (R.T. 115); he and the manager would observe the nude performers and the patrons to see what they were doing. (R.T. 121.) Mr. Poff stated that during the ten or eleven months in which he has presented nude entertainment, he has had a uniformed guard or an employee watch the patrons, and did not recall ever having to eject a patron for being unruly. (R.T. 119.)

It is our opinion that the conduct between performers and patrons described in subcounts 9 and 11 and the comments of patrons documented in other cited subcounts, which were knowingly permitted by licensee over an extended period of time, created situations which were per se contrary to public welfare or morals and subjects licensee to disciplinary action. (Boreta

Enterprises, Inc. v. Dept. of Alcoholic Bev. Control, supra, 2 Cal.3d 85.)

The issues raised by appellant, which were also considered in another case pertaining to licensee (AB-3451), involving similar conduct, are deemed to be without merit.

This board determines that the evidence supports the findings and the findings support the department's decision herein.

In view of the foregoing, the decision of the Department of Alcoholic Beverage Control in the present proceeding is hereby affirmed.

HUGH M. BURNS, CHAIRMAN
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

We Concur:
Eugene V. Lipp
Kay Valory

Sacramento, California
January 14, 1972

APPENDIX C

Los Angeles, Cal. Feb 24 1972

TITLE (Poff) No. 39853
(A. B. C., ETC., ET AL)

THE COURT: Petition for writ of review denied.

CLAY ROBBINS, Clerk

APPENDIX D

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAR 22 1972

DEAR SIR: I have this day filed Order

HEARING DENIED

In re: 2 Civ. No. 39853

Poff

vs.

Department of Alcoholic Bev. Control

Respectfully,

G. E. BISHEL
Clerk

SUBJECT INDEX

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IN THE

Supreme Court of the United States

October Term, 1972
No. .....

ROBERT E. POFF, doing business as 1st KING,

Petitioner,

vs.

THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF THE STATE OF CALIFORNIA and THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA,

Respondents.

On Petition for Writ of Certiorari to the California Court of Appeal

BRIEF OF RESPONDENT IN OPPOSITION

Opinions Below

The decision of the Department of Alcoholic Beverage Control that is the subject of this litigation suspending petitioner's license for thirty days is reproduced as Appendix A to the petition. The opinion of the Alcoholic Beverage Control Appeals Board affirming the suspension is set forth as Appendix B to the petition.

The order of the Court of Appeal, Second Appellate District, is reproduced as Appendix C to the petition, and the order of the Supreme Court of the State of California denying a hearing without opinion is attached as Appendix D to the petition.

Questions Presented

1. Is the Alcoholic Beverage Control Act of the State of California unconstitutional insofar as it permits the Department of Alcoholic Beverage Control to revoke a license upon a determination that live entertainment is obscene or is contrary to public welfare or morals after an administrative proceeding without requiring the Department to seek a judicial determination on the subject.

2. Is the power of the Department of Alcoholic Beverage Control to suspend or revoke a license for conduct contrary to public welfare or morals unconstitutionally broad when applied to speech and expression protected by the First Amendment.

3. Was the Department's finding that the events described in the decision were contrary to public welfare or morals supported by evidence sufficient to satisfy the requirements of the First and Fifth Amendments.

Statement of the Case

Petitioner's petition for writ of certiorari accurately sets forth the progress of this case before the Department of Alcoholic Beverage Control, the Alcoholic Beverage Control Appeals Board and the courts of the State of California. Further, at page 7 of the petition, petitioner states that "All of the findings of fact contained in the decision are supported by the evidence or by stipulation, with the singular exception of the finding that the various described acts were contrary to public welfare or morals." Additionally, the hearing officer's proposed decision (Appendix A to the petition) accurately sets forth the factual issues and thus same will not be repeated herein.

ARGUMENT

I

Petitioner Was Not Charged With Obscene Conduct and Thus There Is No Requirement That the Department Seek a Judicial Determination on the Subject

Petitioner contends that the Department is required to seek a judicial determination as to whether the conduct involved was obscene pursuant to *Blount v. Rizzi*, 400 U.S. 410 (1971). However, petitioner fails to recognize that the charge involved in the accusation was that the conduct was contrary to public welfare and morals; not that the conduct was obscene. Accordingly, no separate judicial determination is required on the issue of obscenity. It is submitted that the Department was not attempting to control petitioner's conduct because it was obscene, but because of the inimical results that might flow from such conduct.

Additionally, this case differs from *Blount, supra*, in that under the procedures of 39 U.S.C. section 4007 only probable cause is needed to obtain a restraining order. Under the Alcoholic Beverage Control Act a full hearing on the issues is afforded petitioner. However, since obscenity was never an issue in the instant case, *Blount* clearly does not apply.

Petitioner also contends that its conduct was a form of expression protected by the First Amendment since the female employees of petitioner were performing a dance for the purpose of entertainment at the time the objectable conduct occurred. However, the inquiry does not stop at that point.

> ". . . We deal in this case not with free speech alone, but with expression mixed with particular conduct. . . ." *Cox v. Louisiana*, 379 U.S. 559, 562, 564 (1965).

Thus if we accept petitioner's contention that the objectionable conduct was a form of communication, such conduct cannot continue unfettered. In the case of *United States v. O'Brien,* 391 U.S. 367 (1968) the court stated as follows:

> "However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, *a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.* To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. . . ." *United States v. O'Brien, supra* at 376-77. (Emphasis added.)

Of course the power of the government to enact legislation and to delegate to administrative agencies the power to enact regulations pursuant thereto cannot be

viewed as unlimited. It would seem the government would have little success in attempting to prohibit sales of the book *Fanny Hill* on the theory that, although not obscene, it was contrary to public morality. As noted by the California Supreme Court in *In re Giannini,* 69 Cal. 2d 563, 569, n. 2, 72 Cal. Rptr. 655 (1968), the problem is one of striking a balance between freedom of expression and the interest of the state in protecting public morality. The constructing of one rule to cover all situations will undoubtedly be unwise if even possible. Nevertheless for the present case and for alcoholic beverage cases in general a standard can be established. The dissenting opinion of District Judge William P. Gray briefly, but articulately, expresses this standard by referring to the potentially harmful effects of prohibitive conduct *in combination with the use of alcoholic beverages.* When the conduct of nude dancing combined with the use of alcoholic beverages creates a threat to public welfare and morality the legislature is reasonable in exerting its police power to enact legislation designed to eliminate or curb these harmful effects. Whether a particular statute or regulation is a most wise or most effective method in accomplishing this purpose is not a question for the court. *Williamson v. Lee Optical Company,* 348 U.S. 483 (1955); *Berman v. Parker,* 348 U.S. 26 (1954).

The United States Supreme Court has made it clear that the First Amendment right of freedom of expression is not absolute and is subject to government regulations under conditions established by such decisions such as *United States v. O'Brien,* 391 U.S. 367.

> "At the outset we reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are 'absolutes'

> . . . . Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. . . . On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. . . ." *Konigsberg v. State Bar,* 366 U.S. 36, 49-51 (1961).

The power of the Department is directed to the regulation and control of the liquor industry. The exercise of this governmental interest justifies incidental limitations on freedom of expression.

Petitioner further claims that the Department's determination that its conduct was *per se* contrary to public welfare or morals has in effect deprived petitioner of a fact hearing on the critical issue. However, petitioner fails to recognize that the California courts have not required the Department to introduce evidence pertaining to standards of morality generally accepted by the community when the conduct involved can be almost immediately repudiated as being contrary to said standards.

> "There may be cases in which the conduct at issue is so extreme that the Department could conclude that it is per se contrary to *public morals*. By this we mean that it is so vile and its impact upon society is so corruptive, that it can be almost immediately repudiated as being contrary to the standards of morality generally accepted by the community after a proper balance is struck between personal freedom and social restraint. . . ." *Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control*, 2 Cal. 3d 85, 101, 84 Cal. Rptr. 113 (1970).

Respondent recognizes that such conduct may very well not be subject to criminal prosecution for violation of the obscenity laws. However, the Department of Alcoholic Beverage Control is not confined to consideration of violation of criminal statutes or departmental directives as grounds for suspension or revocation of a liquor license. It may act on situations contrary to public morals regardless of legislative expressions of the policy on the subject or prior departmental announcement. *Boreta Enterprises Inc. v. Department of Alcoholic Beverage Control, supra* at 99 n. 22. The principle that the state has an interest in regulating conduct manifesting sexual desires and urges which offend public morals is well established.

> ". . . Conduct which may fall short of aggressive and uninhibited participation in fulfilling the sexual urges of homosexuals, reported in some instances [citation], may nevertheless offend good morals and decency by displays in public which do no more than manifest such urges. This is not

> to say that homosexuals might properly be held to a higher degree of moral conduct than are heterosexuals. But any public display which manifests sexual desires, whether they be heterosexual or homosexual in nature may, and historically have been, suppressed and regulated in a moral society." *Vallerga v. Dept. of Alcoholic Bev. Control,* 53 Cal. 2d 313, 319, 1 Cal. Rptr. 494 (1959).

Respondent wishes to emphasize that the acts found in the decision of the Department to have occurred and which were sustained by respondent Alcoholic Beverage Control Appeals Board extended beyond the limited realm of nude dancing and included misconduct of the licensee's employees. Section 23090.3 of the Business and Professions Code provides in relevant part as follows:

> "The findings and conclusions of the department on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the department . . ."

Respondent submits that there can be no doubt that the conduct which was found to have occurred can indeed be immediately repudiated as contrary to public morality. *Cf. Alder v. Dept. of Alcoholic Bev. Control,* 174 Cal. App. 2d 256, 344 P. 2d 336 (1959).

II

The Power of the Department to Suspend or Revoke a License for Conduct Contrary to Public Morals as Applied to Conduct Which Is a Form of Expression Is Not Unduly Vague Since the Power Is Not Susceptible of Sweeping and Improper Implication

It is well established that the power of the Department to suspend or revoke a license for conduct contary to public morals is self executing and may be based on those grounds alone if the licensee is otherwise accorded due process of law. *Vallerga v. Dept. of Alcoholic Bev. Control,* 53 Cal. 2d 313, 319, 1 Cal. Rptr. 494. In *Boreta Enterprises Inc. v. Department of Alcoholic Beverage Control,* 2 Cal. 3d 85, 84 Cal. Rptr. 113, the California Supreme Court stated:

> "It is not disputed that while the Department may properly look to and consider a licensee's violation of the Alcoholic Beverage Control Act, the Penal Code, other state and federal statutes, or Department rules as constituting activities contrary to public welfare or morals, it may also act on situations contrary to the public welfare or morals in the sale or serving of alcoholic beverages regardless of legislative expressions of policy on the subject or *prior* departmental announcements." *Boreta, supra* at 99, n. 22 (emphasis added).

The conduct in the present case is similar in some respects to that in the *Vallerga* case. *Vallerga* involved public display of sexual desires by patrons on licensed premises. In this case each of the subcounts involved expressions of a vulgar and distasteful nature sug-

gesting sexual desires on the part of the patrons. The power of the Department to impose disciplinary action for conduct of patrons which is contrary to public morality is well established. *Morell v. Dept. of Alcoholic Bev. Control,* 204 Cal. App. 2d 504, 22 Cal. Rptr. 405 (1962); *Presto v. Alcoholic Bev. Etc. Appeals Bd.,* 179 Cal. App. 2d 262, 3 Cal. Rptr. 742 (1960); *Givens v. Dept. of Alcoholic Bev. Control,* 176 Cal. App. 2d 529, 1 Cal. Rptr. 446 (1959).

Nevertheless petitioner urges that the conduct involved in the present case is protected by the First Amendment and as applied to conduct protected by the First Amendment suffers from vagueness and overbreadth.

Discipline in the present case is found in part on the elements of vulgar and distasteful comments by patrons. Nevertheless, those comments are a form of expression *in absence of proof* of obscenity and are presumptively protected by the First Amendment.[1] Respondent will deal in subsequent portions of this brief with the question of whether the Department may regulate the contrary to public morals conduct which is presumptively protected by the First Amendment. Whatever the outcome of that issue, the power of the Department to regulate conduct as contrary to public welfare or morals does not suffer from vagueness or overbreadth. In *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963) the court stated:

> ". . . The objectionable quality of vagueness and overbreadth does not depend upon ab-

[1]Respondent also suggests that the comments in the present case may fall into a class of extreme or unquestionable situations which obviate the need of proof of community standards. *Cf. In re Giannini,* 69 Cal. 2d 563, 575-76, n. 8, 72 Cal. Rptr. 655.

sence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . ." *N.A.A.C.P. v. Button, supra* at 432-33.

The decision of the California Supreme Court in *Boreta Enterprises Inc. v. Department of Alcoholic Beverage Control,* 2 Cal. 3d 85, 84 Cal. Rptr. 113, assures that the power of the Department pertaining to the regulation of conduct contrary to public morality will not be applied in a sweeping and improper manner by requiring that the question of public morality be proved as any other fact at a trial, unless the conduct involved is *per se* contrary to public morality. With this requirement of proof *per se* public morality, the application of the power of the Department can be no broader than the power itself.

III

The Power of the Department to Regulate Conduct Contrary to the Public Morality Is Not Limited to Obscenity

Petitioner's contention that the power of the Department to regulate the public morals is limited to obscenity rests heavily on the decision in the case of *LaRue v. State of California,* 326 F. Supp. 348 (C.D. Cal. 1971), Jur. noted, *California v. LaRue,* 92 S.Ct. 559 (1971).

In the *LaRue* case, the three judge panel held that the regulation promulgated by the Department pertaining to the subject of entertainer's conduct and visual displays unconstitutionally interfered with the

right of freedom of expression under the First Amendment. In the present case, the accusation was based on violations of laws pertaining to the public welfare and morals, and not upon violations of these regulations. Furthermore the conduct involved in the present case is far more severe in substance than the conduct proscribed by the regulation in the *LaRue* case. Nevertheless, the basis for the court's holding was that the power of government to regulate the kind of conduct involved is limited to instances of obscenity. At page 356, in the *LaRue* case the court stated:

> ". . . The First Amendment, however, directs that concepts of public welfare and morality may not prohibit a dance no matter how immoral it may appear to be, unless it violates an obscenity statute that meets the test of *Roth*. . . ."

Since in the present case it is not proven in accordance with the guidelines established by the California Supreme Court in *In re Giannini, supra,* 69 Cal. 2d 563, 72 Cal. Rptr. 655, that the conduct involved was obscene under the Roth test the decision in the present case must be remanded unless a decision in *LaRue* is erroneous. The decision is erroneous. The assumption of the court in *LaRue* that the power of government in protecting the public morality is limited to matters which are obscene as they relate to conduct which constitutes a form of expression is based on the court's misinterpretation of the decision in *Stanley v. Georgia,* 394 U.S. 557 (1969). In the *LaRue* decision, the court stated at page 356:

> "Theatrical entertainment may not be prohibited without a constitutional obscenity test

> because the state deems it necessary to protect the welfare and morals. That decision was made by the Supreme Court in Stanley v. Georgia, . . ."

Putting aside for the moment the main issue of whether the power of the state in protecting the public morality is limited to obscene matters, a recent decision of the United States Supreme Court makes it clear that the court in *LaRue* improperly relied on *Stanley v. Georgia, supra,* in deciding this issue. The decision in *United States v. Reidel,* 402 U.S. 351, 355, 356 (1971) rendered subsequent to the *LaRue* decision, stated as follows:

> "The District Court ignored both Roth and the express limitations on the reach of the Stanley decision. Relying on the statement in Stanley that 'the Constitution protects the right to receive information . . . regardless of their social worth,' 394 U.S. at 564, the trial judge reasoned that 'if a person has the right to receive and possess this material, then someone must have the right to deliver it to him'. He concluded that section 1461 could not be validly applied 'where obscene material is not directed at children, or it is not directed at an unwilling public, where the material such as in the instant case is solicited by adults. . . .'
>
> "The District Court gave Stanley too wide a sweep. To extrapolate from Stanley's right to have and peruse obscene material in the privacy of his own home a First Amendment right in Reidel to sell it to him would effectively scuttle Roth, the precise result that the Stanley opinion abjured.

Whatever the scope of the 'right to receive' referred to in Stanley, it is not so broad as to immunize the dealings in obscenity in which Reidel engaged here—dealings that Roth held unprotected by the First Amendment.

"The right Stanley asserted was 'the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home.' 394 U.S. at 565. The Court's response was that 'a State has no business telling a man, sitting alone in his own house what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.' Ibid. The focus of this language was on freedom of mind and thought and on the privacy of one's home. It does not require that we fashion or recognize a constitutional right in people like Reidel to distribute or sell obscene materials. The personal constitutional rights of those like Stanley to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by the Constitution."

Whatever the outcome of the issue raised in the *LaRue* case, the reasoning of the United States District Court in its decision was based on the false premise that the *Stanley* case applies to matters of *public* concern.

The present case is not concerned with the right of privacy, but is concerned with the protection of *public*

morality. The enactment of laws for the protection of the public morality is one of the traditional powers of government which falls within the police power of the state. *Berman v. Parker,* 348 U.S. 26, 32 (1954); *Vallerga v. Dept of Alcoholic Bev. Control,* 53 Cal. 2d 313, 1 Cal. Rptr. 494. The question is then to what extent may this traditional power of government to enact legislation for the protection of the public morality intrude upon a form of expression which potentially is protected by the First Amendment.[2]

IV

The Regulation of the Nonspeech Elements in Nude Dancing for the Protection of the Public Morality Justifies Incidental Limitations on First Amendment Freedoms

Even though the conduct in the present case, nude suggestive dancing by a performer and vulgar and disgusting comments by patrons, is a form of expression, as previously stated, the inquiry does not stop at this

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[2]The validity of this approach to the question was expressly confirmed by the California Supreme Court in a footnote to the decision in *In re Giannini,* 69 Cal. 2d 563, 569, 72 Cal. Rptr. 655, where the court stated:

"Indeed, the concepts of 'potential' and *prima facie* First Amendment protection are becoming increasingly important in areas other than obscenity law. The restricted and literal approach to the definition of speech protected by the First Amendment is gradually being replaced by an emphasis on the interest in communication, whether or not promoted by conduct that is precisely speech. The protection of this interest depends upon a balancing process: the weighing of the interest of the state in suppressing or regulating the questioned conduct as against the opposing interest in the interchange of ideas. [Citations.] California's obscenity law here at issue represents merely a particular, albeit well-

(This footnote is continued on next page)

point as is so often assumed by licensees. As previously stated, in the case of *United States v. O'Brien*, 391 U.S. 367, the court stated as follows:

> ". . . However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity. This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, *a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.* To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. . . ." (Emphasis added.) *Supra* at 376-77.

The court in *LaRue* failed to come to grips with this issue because it assumed that the interest and power of

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established, example of this balancing if interests to determine whether First Amendment guarantees apply to a particular example of communication or whether sufficiently important state interests dictate a contrary result."

the government is limited to the prohibition of obscenity. As stated in the opinion:

> ". . . The resulting restriction on First Amendment freedoms is considerably greater than is essential to the furtherance of any legitimate state interest since the Department could, as has been done by the California Legislature, *limit its prohibition to obscene entertainment.*" (Emphasis added.) *LaRue v. State of California, supra,* 355.

As has been the case with this and all other similar cases where the basis of the disciplinary action is the permitting of conduct contrary to public morals in the context of nude entertainment, if it were necessary to show that the entertainment was obscene, all the Department's cases would have to be reversed. The illogic of the Court's reasoning is pointed out by its own statement at page 355 where it says:

> "Of course, sexual conduct between a dancer and a customer could hardly be termed a theatrical performance which is protected by the First Amendment. . . ."

Is the court in *LaRue* saying that if the sexual conduct on stage was only between performers and not with a customer that it could not be prohibited? Would then the court condone sexual intercourse on stage when it occurs during a theatrical performance? Would the court permit draft card burning, the conduct prohibited in the *O'Brien* case, if it occurred in the context of a theatrical performance? The implicit assumption of the court in its statement regarding sexual conduct between a dancer and a customer is that such conduct would *obviously be contrary to public morality.* The weakness of the court's analysis that the interest of the

government is limited to obscenity in the field of public morality is exposed by its attempt to make an exception in what appears to be an extreme case.

The analysis of the court in the *LaRue* case is further weakened by its reliance upon the decision in *Redrup v. New York*, 386 U.S. 767 (1967), at pages 13 and 15 of the decision. On page 355 of the *LaRue* decision the court states:

> ". . . In light of the pre-trial stipulation, it is uncontested that none of the legitimate state interests summarized in Redrup v. New York [citation], in the field of obscenity are involved in the present case. Minors are not allowed to view the entertainment. There is no 'pandering' and the entertainment is presented in such a way that it is not forced upon unwilling individuals."

This approach was also rejected by the court in *United States v. Reidel*, 402 U.S., 351, 357 where the court stated as follows:

> "It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. The concepts involved are said to be so elusive and the laws so inherently unenforceable without extravagant expenditures of time and effort by enforcement officers and the courts that basic reassessment is not only wise but essential. This may prove to be the desirable and eventual legislative course. . . ."

The United States Supreme Court has made it clear that the First Amendment right of freedom of expression is not absolute and is subject to government regulations under conditions established in such decisions as *United States v. O'Brien, supra.*

> "At the outset we reject the view that freedom of speech and association . . . as projected by the First and Fourteenth Amendments, are 'absolutes' . . . . Throughout its history this Court has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection. . . . On the other hand, general *regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise,* have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating *valid governmental interests;* a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. . . ." *Konigsberg v. State Bar,* 366 U.S. 36, 49-51 (emphasis added).

The power of the Department is directed to the regulation and control of the liquor industry. The exercise of this valid governmental interest justifies incidental limitations of freedom of expression.

The disgusting comments of patrons manifesting sexual desires in response to the dancing can be immediately repudiated as contrary to the public morality

of the State of California. The interest of the state in regulating conduct manifesting sexual desires and urges which offend public morals is well established. Since the conduct in the present case is *per se* contrary to public morals, it is of no consequence that petitioner offered testimony on his behalf to the contrary. ***Boreta Enterprises Inc. v. Department of Alcoholic Beverage Control,*** 2 Cal. 3d 85, 94, 84 Cal. Rptr. 113.

All of the facts charged against petitioner were admitted by stipulation or as petitioner admits were supported by the evidence. Accordingly, respondent submits that the decision of the Department was supported by substantial evidence and that the acts complained of were *per se* contrary to public welfare and morals.

Conclusion.

For the foregoing reasons and authority, respondent respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

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